



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 13 of 2005

ALFAN SAID

BRUNO KAIBUNGA

CHARLES NJUE KIVATI

SWALEH SHEE

DAVID KIOGORA M'RINGERIA

EVANS OKENO

FATUMA ALI ABDALLA

KAHINDI KALUME KENGA

JOHN KILARA.....PLAINTIFFS

VERSUS

1. NAJIB ISLAM OMAR

2. BREK ISLAM OMARDEFENDANTS

J U D G M E N T

This is a suit brought by the plaintiff by way of Originating Summons dated 12th January 2005 under the provisions of Order XXXVI, Rule 3 of the Civil Procedure Rules and Section 38 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya.

There are nine (9) plaintiffs who have sued the two Defendants herein and seek the following Orders:-

1. *That the plaintiffs be declared to have become entitled by adverse possession of over 12 years to 0.158 acres of law land known as Mombasa/Block XI/176 registered under the Registered Land Act (Cap 300) Laws of Kenya and situated at Kiziwi Area, Tudor Mombasa District.*
2. *That the plaintiffs be registered as the joint proprietors of the said parcel of land known as Mombasa/Block XI/176 situated at Kiziwi Area, Mombasa District.*

The Defendants were duly served with the Originating Summons but they did not enter any appearance or defence in the case. They were also duly served with the hearing notices.

Eight plaintiffs duly testified on oath. The case was initially heard by the Honourable Justice Sergon who took the evidence of 5 plaintiffs.

Upon my transfer to Mombasa High Court and the Honourable Justice Sergon to Nyeri, I took the evidence of three plaintiffs after directions were given.

PW1 stated that he entered the plot in 1984 and put up a kiosk in 1984. That he was on the said property undisturbed until 2004 when his plot was demolished.

PW 2 testified that he entered the plot in 1988 having bought a kiosk standing on the land. The kiosk was demolished in 2004.

P.W.3 said that he entered the land in 1966 and had a permanent structure on the land until 2004 when he was evicted.

P.W.4 said that he entered the land in 1991 after which he started operating a kiosk on the said plot. That on or about 26th October 2004 he was evicted on the ground that he was in illegal occupation thereof.

P.W.5 testified that he entered the plot in 1990. He ran a charcoal

business on the premises where he also resided. He stated that he was forcefully evicted in 2004.

P.W.6 testified that he lived on the plot from 1973 until 2004. Someone came in 2004 claiming ownership. That the land is about half an acres. He was evicted from the plot in 2004.

P.W.7 testified that she used to live on the land where she was born. Her parents used to live in the land. That she was born during the Second World War. That she lived on the land up to October 2004. She never paid any rent.

P.W.8 stated that his father had a mini-shop on the suit property from 1981. He himself entered the property in 1991 after taking the shop from his father. He said that in October 2008, he was evicted from the land. He was evicted by one Ali Ramadhan Masau with Council Askaris and they used force to do so.

All the plaintiffs claim that upon entering the suit property each of them exercised overt acts of ownership without there being a question raised by the initial owners or their alleged trustees in succession. That they have respectively continuously and adversely occupied various portions of the said plot for periods ranging from over 12 years to 20 years.

I have considered the Originating Summons and respective supporting affidavits, testimonies and submissions by Counsel.

In the book, "the Law of Real Property" by Megarry & Wade 6th Edition (Sweet & Maxwell at P. 1308) It is observed:-

“.....

Adverse possession. Before 1853, “adverse possession” bore a highly technical meaning. Today it merely means possession inconsistent with the title of the true owner and not e.g. possession under a license from him or under some contract or trust. There is a presumption that the owner of the land with the paper title is in possession of the land. To establish adverse possession, a squatter may prove that he had both factual possession and the requisite intention (animus possidendi). If a person is in possession of land with the permission of the true owner, his possession cannot be adverse.....”

The next passage states:

“... FACTUAL POSSESSION. To establish adverse possession the squatter must demonstrate that by his acts he has taken sufficient degree of exclusive physical control. Whether he has done so is a matter of fact, depending on all the circumstances, in particular the nature of the land and the manner in which such land is commonly enjoyed...”

.....
.....

Both because exclusive control is essential to establish adverse possession and because of the presumption that the paper owner remains in possession of the land, trivial acts will rarely suffice to establish adverse possession.....

Once factual possession has been established, it will not be terminated merely because the true owner sends a letter to the squatter requiring him to vacate the premises. Time will continue to run in favour of the squatter unless and until he vacates the premises or acknowledges the true owner’s title.”

From the foregoing, it is clear that a person claiming adverse possession must be in exclusive control and possession of the land he claims. This must be factual but not necessarily physical. It has been stated that in many cases adverse possession cannot in the nature of things be continuous from day to day.

In this case the title holders were duly served but did not defend the suit. They were even served with the hearing notices while the Applicants were physically dispossessed by eviction in October 2004, they filed proceedings on 21.01.2005. The aggressors are not the title holders but some third party. The said individual did not have a court order and legal basis to evict the plaintiff. The search documents produced show that the Defendants were still registered owners. The court cannot therefore assume that it is the title owners who are in possession only.

In any case after such length of absence and possession by the applicants, one was required to only evict them or obtain possession by lawful means and not by brute force. The Applicants came to court within less than 3 months to seek redress.

I am satisfied that in the circumstances, the plaintiff’s have acquired their respective portions of land in the suit premises by adverse possession. In Kenya today, I do hold that it is possible in law and feasible for a group of individuals as squatters can come to court and seek

enforcement of claims of adverse possession unlike other jurisdictions where this concept is unknown and claimants came as individual. Our Communal system and society which believes in collective rights demand that the right claims of adverse possession is not confined to the individual.

I therefore do hereby enter judgment for the plaintiffs in terms of prayer 1 and 2 of the Originating Summons dated 12.01.2005.

No order as to costs.

Dated and delivered at Mombasa this 28th day of June 2010.

M.K. IBRAHIM

J U D G E

Coram:

Ibrahim, J

Court clerk – Kazungu

Mr. Muhuni for the Plaintiffs

No appearance for the Respondents

Judgment delivered in their presence.

Ibrahim, J